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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re J.M. et al., Persons Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

L.M.,

Defendant and Appellant.

C058919

(Super. Ct. Nos.
JD224602, JD224603,
JD224604, JD224605,
JD224606, JD224607,
JD224608, JD224609)

L.M. (appellant), the mother of eight minors, appeals from an order of the juvenile court denying her motion for substitution of appointed counsel. Claiming an irreconcilable conflict with trial counsel existed, such that ineffective representation by counsel was a likely outcome, appellant contends the juvenile court's denial of her motion was an abuse of its discretion, from which she suffered prejudice. Disagreeing with that claim of error, we affirm the judgment.

FACTS AND PROCEEDINGS

Some of the material in this section derives from our opinion in a previous appeal filed by appellant and the father of the minors (*In re J.M.* (Nov. 18, 2008, C057251) [nonpub. opn.]], of which we take judicial notice. (Evid. Code, § 451, subd. (a).)

These dependency proceedings began in the fall of 2006, when Department of Health and Human Services filed petitions on behalf of each of the eight minors, then ranging in age from one to 13 years old. Those petitions alleged generally that the minors were at a substantial risk of suffering serious physical harm because of the failure of appellant and the father of the minors to supervise the minors and provide them with adequate food, clothing, shelter, or medical treatment. According to the petitions, in the summer of 2006, law enforcement found the minors living in a substandard motor home in a Sacramento County business parking lot. (*In re J.M., supra*, C057251, at p. 2.) The juvenile court sustained those petitions, adjudged the minors dependent children, and ordered them removed from parental custody. (*Id.* at p. 3.)

On January 30, 2008, appellant filed a motion for dismissal of her counsel, seeking new representation. The motion stated in part: "I feel it is imperative that certain things be done on my behalf to represent me more effectively. [Counsel for appellant] is dead set against some of the procedures I am asking her to perform, and has told me in no uncertain terms

that I should 'get used to the idea that some of my children will be getting adopted' at the end of these proceedings. I don't feel my representation is trying to do her utmost to help me re-unify with my 'entire' family, which she took an oath to perform."

"ISSUES WITH CURRENT COUNSEL

"1. [Counsel for appellant] refused to submit to the court my document entitled: Objections and Corrections[.]

"2. I had to file my own appeal to the court's decision.

"3. [Counsel] refuses to defend my constitutional rights (due process).

"4. [Counsel] refuses to apply to the court on my behalf for an expert witness.

"5. I have been told by social worker and others that I am going to lose this case & [counsel] seems to have adopted this same thinking. I[t] would seem she agrees & believes I should [sic] some if not all of my children. I received an e-mail from [counsel] stating just this fact.

"6. I feel I am not actually getting legal representation, but a lawyer going through the motions, putting on what would appear to be a good front for the record but not effective in the court room."

At the January 30, 2008, hearing on appellant's motion for substitute counsel, appellant restated some of the claims contained in her written motion, and also faulted her trial counsel for failing to file various documents. Moreover, appellant stated her counsel was not "producing the best that

she can do." In response, appellant's trial counsel acknowledged a "breakdown in communication" existed between them, but did not believe she had rendered ineffective assistance.

In denying appellant's motion for substitute counsel, the juvenile court stated in part: "I've listened carefully to both people here and carefully considered it. First of all, somebody who has court-appointed counsel, anybody that has counsel, you're not entitled to an attorney who will conduct the case according to the way you want it conducted. [¶] I agree with [counsel for appellant]. Obviously, she has some discretion with regard to legal judgments and disagreement as to tactics or strategy. It's not a sufficient reason to require substitution of counsel, so I don't find that--and also, in each--pretty much each complaint that you've had, [appellant], has been, I think, explained by [counsel for appellant]. So I don't find a substantial reason to change counsel here for you. [¶] I think there is somewhat of a communication problem. I don't think it's something that can't be fixed, and I also don't think that it would--I'd have reason to believe it would be better if another court-appointed counsel--I have no reason to believe it would be any better if another court-appointed counsel--it might be the same situation that we're in now, which is, you're having some troubles communicating. [¶] But I don't think it's something that can't be resolved. It sounds like there's some bad feelings, but you know, attorneys and clients, sometimes that happens. It doesn't mean that you should dissolve the

relationship. I think maybe you just need to be a little more clear. Both can be a little more clear and clarify anything that you don't understand. But it's not substantial enough reasons to relieve counsel, so the [motion] is denied."

On February 13, 2008, the juvenile court granted appellant's motion to represent herself.

DISCUSSION

Appellant contends that, in denying her motion for substitute counsel, the juvenile court abused its discretion, prejudicing her by compelling her to represent herself. According to appellant, the evidence showed that she and trial counsel had such an irreconcilable conflict that ineffective assistance of counsel was likely to result. In fact, appellant avers, her counsel already had failed to provide adequate representation.

In a criminal case, when a defendant requests substitute counsel, the trial court must permit the defendant to explain the reason for the request. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-124.) The court need not grant the request for substitution of counsel absent a showing that denial would substantially impair the defendant's right to the assistance of counsel. (*Id.* at p. 123; *People v. Turner* (1992) 7 Cal.App.4th 913, 917.) However, denial of the opportunity to explain constitutes an abuse of discretion. (*Marsden*, at pp. 123-124.)

In a dependency proceeding, the parents have a statutory and a due process right to competent counsel. (Welf. & Inst.

Code, § 317.5; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151, fn. 3, 1153, fn. 6.) When counsel is retained and the parent believes counsel is inadequate, the parent can simply fire the retained attorney. However, parents for whom counsel is appointed cannot do so. These parents must have some mechanism for challenging the representation when they perceive inadequacy or the right to counsel is meaningless. Thus, juvenile courts, relying on the *Marsden* model, have permitted the parents to air their complaints about appointed counsel and request new counsel be appointed.

An exhaustive *Marsden* hearing is not required. It is only necessary that the juvenile court "make some inquiry into the nature of the complaints against the attorney." (*In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13.) Moreover, the court's duty to permit a person represented by appointed counsel to state the reasons for dissatisfaction with counsel only arises when the person in some manner moves to discharge his current counsel. There must be, at the very least, some clear indication by the defendant or parent that she wants new counsel. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 480-481; *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

In this case, as appellant made clear in her written motion, she sought "new representation." Moreover, in previous motions she also had indicated her dissatisfaction with trial counsel and her desire for substitute counsel. Finally, as the record makes clear, the juvenile court afforded appellant a full opportunity to express the reasons for her request and also made

a proper inquiry into that request, by conducting a formal hearing on the motion.

At the conclusion of the hearing on appellant's motion for substitute counsel, the juvenile court demonstrated it had carefully considered appellant's concerns and acknowledged that "somewhat of a communication problem" existed. However, the court also suggested the difficulties in communication between appellant and trial counsel could be ameliorated, urging both to "be a little more clear and clarify anything that you don't understand." Noting appellant was not "entitled to an attorney who will conduct the case according to the way you want it conducted," the court found there was no "substantial reason" to order a substitution of counsel for appellant.

We agree with the juvenile court's conclusion. Based on the record before it, the court's implicit determination that the conflict between appellant and her trial counsel was not irreconcilable was well within its discretion. (Cf. *People v. Fierro* (1991) 1 Cal.4th 173, 204.) The record reflects that difficulties with communication existed, but they did not appear to be irreconcilable. The fact that appellant later moved successfully to represent herself does not undermine our conclusion, as that was a separate matter which appellant has not challenged in this appeal.

Without making a separate argument, appellant cites multiple instances of alleged inadequate representation by trial counsel. They include communication matters and allegedly inadequate explanations by counsel for her failure to file

various documents. As to communication issues, we have discussed them previously, and agree with the juvenile court's determination that responsibility cannot be attributed solely to trial counsel. The other matters are tactical issues about which we cannot say no satisfactory explanations for trial counsel's conduct existed. (Cf. *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Appellant's complaint that the juvenile court "ignored the evidence" in stating its reasons for denying her motion for substitute counsel is not supported by the record. We presume the court was aware of appellant's previous statements of dissatisfaction with her trial counsel and knew that in the past appellant had filed some documents on her own initiative. (Evid. Code, § 664.) Moreover, as we have noted previously, the court stated explicitly that it had "carefully considered" the matter, and the record supports that determination. Finally, as to appellant's loss of confidence in her counsel and appellant's belief that counsel had "given up on" appellant in some respects, doubtless the court was aware of those sentiments, which were implicit in appellant's motion. In sum, there was no abuse of discretion or other error.

Finding no abuse of discretion, we need not consider appellant's claims of prejudice.

DISPOSITION

The order of the juvenile court denying appellant's motion for substitute counsel is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.